Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Tribune Media Company (Transferor)	)	MB Docket No. 17-179
and	)	
Sinclair Broadcast Group, Inc. (Transferee)	)	
Consolidated Applications for Consent to Transfer Control	)	

APPLICANTS' OPPOSITION TO MOTION REQUESTING TO HOLD PROCEEDING IN ABEYANCE

Pursuant to Section 1.45(d) of the Commission's rules,[1] Sinclair Broadcast Group, Inc. ("Sinclair") and Tribune Media Company ("Tribune," and together with Sinclair, "Applicants") oppose the "Motion Requesting to Hold Proceeding in Abeyance," filed on June 29, 2018, by Public Knowledge and Common Cause ("Movants"). Movants have asked the Commission to hold the above-captioned proceeding in abeyance pending the outcome of *Free Press, et al. v. FCC*.[2] The Commission should deny Movants' latest attempt to delay this proceeding for all the reasons set forth in Applicants' respective oppositions[3] to Movants' prior unsuccessful attempts

[1] 47 C.F.R. § 1.45(d) ("Oppositions to a request for stay of any order or to a request for other temporary relief shall be filed within 7 days after the request is filed. Replies to oppositions should not be filed and will not be considered.").

[2] Case No. 17-1129 (D.C. Cir. 2017).

[3] *See, e.g.*, Sinclair Broadcast Group, Inc.'s Opposition to Free Press et al. Petition for Stay Pending Judicial Review (filed May 17, 2018); *see also Free Press et al. v FCC*, Case No. 17-1129, Sinclair Broadcast Group, Inc.'s Opposition to Emergency Motion for Stay (filed June 1, 2017) and Opposition of Movant-Intervenors Tribune Media Company et al.to Petitioners' Emergency Motion for Stay (filed June 1, 2017).

to do so,[4] as well as for the reasons provided in Applicants' Second Consolidated Opposition to Petitions to Deny. (Applicants' earlier oppositions are attached hereto as Exhibits 1-3, and are incorporated herein by reference.)

The Motion improperly seeks to re-litigate the stay request that the D.C. Circuit Court of Appeals denied in June *2017* (and which the Commission also declined to grant).[5] Movants' attempt to characterize their "new" request as more narrowly tailored than their earlier requests is nothing more than transparent gamesmanship.[6] Although their previous requests purported to stay the reinstatement of the UHF discount, the underlying intent is identical: to obstruct or delay Sinclair's acquisition of Tribune. Like the instant Motion, the earlier requests were laser-focused on the Sinclair-Tribune merger—indeed, the merger was the *only* harm alleged in the earlier filings.[7] Accordingly, both the Commission and the court have had a full opportunity to evaluate and address Movants' concerns, and each has refused to grant the requested injunctive relief. The Commission should likewise refuse to grant abeyance now.

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[4] Movants failed in their prior requests for stay before both the FCC and the U.S. Court of Appeals for the District of Columbia Circuit. *See Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Petition for Stay Pending Judicial Review (filed May 10, 2017 by Free Press, Office of Communication, Inc. of the United Church of Christ, Prometheus Radio Project, Media Mobilizing Project, Media Alliance, National Hispanic Media Coalition, Common Cause); *see also Free Press et al. v FCC*, Case No. 17-1129, Petitioners' Emergency Motion for Stay Pending Judicial Review (filed May 26, 2017).

[5] Order, *Free Press et al. v FCC*, Case No, 17-1129 (June 15, 2017) (denying motion for stay pending review); *see also* Petition for Stay Pending Judicial Review, MB Docket 13-236 (filed by Common Cause, et al. on May 10, 2017) (petitioning the FCC to stay the effective date of the reinstatement of the UHF discount. The Commission declined to act on the stay request and the discount was subsequently reinstated on June 15, 2017.)

[6] Motion at 10-11.

[7] *See* Motion for Emergency Stay at 17-19. Movants' characterization of the current Motion as narrowly-tailored is misleading for the additional reason that it will not only obstruct Sinclair's acquisition of Tribune, but also the pending divestitures.

Additionally, the Motion is untimely. If Movants truly viewed the Sinclair-Tribune transaction as a "game changer" in media ownership and inextricably linked to the court's review of the reinstatement of the UHF discount, they could (and should) have filed the motion months ago. Movants fail to identify any new or credible basis for delaying review in this proceeding, and the cases they cite for support are inapposite. Almost all of the cases cited involve requests by the Federal Trade Commission to enjoin consummation of agreements that violated antitrust laws or where a stay was statutorily required.[8] They do not constitute precedent for an agency to hold its own proceeding in abeyance, particularly where, as here, the proposed transaction is compliant with the Commission's rules.[9] Other cases cited by Movants involve joint abeyance requests that were filed with the consent of the parties and which, therefore, provide no support

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[8] *See, e.g.*, *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 600, 612 (1966) (reinstating temporary restraining order to enjoin consummation of merger where the FTC "had issued a complaint against respondents under § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act." In contrast, the transaction here is consistent with law and cannot be consummated without prior Commission approval.); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 186 (1944) (granting injunction because the alternative *would have been a statutory violation* and there was proclivity for unlawful activity); *United States v. First City Nat. Bank of Houston*, 386 U.S. 361, 370–71(1967) (stay was statutorily required). In any event, "[u]nscrambling may be difficult; but Congress may well have been justified in the view that the extra effort is warranted in the interests of securing what it hoped would be careful administrative consideration of the merits of proposed mergers. Not every merger deserves sudden death." *Dean Foods*, 384 U.S. at 621 (Fortas, J, *dissenting*) (citing *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) (decision six years after merger); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) (decision seven years after merger)).

[9] Movants state they "believe" that the divestitures "would not genuinely reduce" Sinclair's national reach because they "are accompanied by joint services agreements and shared services agreements." Motion at 2 n.4. Not only are Movants wrong as a matter of law (as neither JSAs nor SSAs are attributable under the Commission's rules), but this statement belies their misunderstanding of the transaction at hand and of the Commission's national ownership rule. Only four of Applicants' 21 divestitures involve JSAs or SSAs, and none of those four divestitures is required to comply with the national ownership rule. Three are in markets where Sinclair already owns stations—and thus have no impact on Sinclair's national reach because those markets are already accounted for—and Sinclair could own the fourth station and remain under the 39% cap. *See* Applicants' April 24 Amendment to Comprehensive Exhibit.

for grant of a contested motion.[10] And rather than support Movants' request, the remaining cases actually suggest that the D.C. Circuit should hold the UHF discount appeal in abeyance pending forthcoming Commission action in the related National Cap rulemaking proceeding, the outcome of which could render the D.C. Circuit litigation moot.[11]

For the reasons stated above and in Applicants' other filings incorporated by reference herein, the Commission should deny the Motion Requesting to Hold Proceeding in Abeyance.

Respectfully submitted,

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July 5, 2018

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[10] *See, e.g.*, *MCI Telecom Corp. v. Pacific Bell, Order*, File No. E-97-18, DA 99-1863 (Sept. 13, 1999) (parties to the proceeding *jointly* filed motion to hold in abeyance).

[11] *See, e.g.*, *Sw. Bell Tel. Co. v. FCC*, No. 93-1779, 1994 U.S. App. LEXIS 14160, at *1 (D.C. Cir. Mar. 14, 1994) ("Strong considerations of judicial and administrative efficiency counsel in favor of deferring consideration of the petition for review *until agency reconsideration is complete*.") (emphasis added); *Columbia Assocs., L.P. v. FCC*, No. 93-1409; 93-1723, 1994 U.S. App. LEXIS 9997, at *1 (D.C. Cir. Feb. 3, 1994) (holding proceeding in abeyance *pending reconsideration at FCC*); *Order, Nat'l Assoc. of Broadcasters v. FCC*, No. 12-1225 (D.C. Cir. February 12, 2013) (granting NAB request to hold court proceeding in abeyance *pending FCC reconsideration*); Order, *National Association of Broadcasters v. FCC*, Nos. 08-1135 *et al.* (D.C. Cir., July 11, 2008) (same). Movants also cite *Naegele v. Albers*, 355 F. Supp. 2d 129 (D.D.C. 2005), for the proposition that "[l]itigating essentially the same issues in two separate forums is not in the interest of judicial economy or in the parties' best interest." But the court's review of whether the FCC satisfied its Administrative Procedure Act obligations when it reconsidered elimination of the UHF discount and the FCC's review of a specific transaction are not at all "the same issues."

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2018, I caused a true and correct copy of the foregoing **APPLICANTS' OPPOSITION TO MOTION REQUESTING TO HOLD PROCEEDING IN ABEYANCE** to be served via email on the following:

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EXHIBIT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.3555(e)	)	MB Docket No. 13-236
of the Commission's Rules, National	)	
Television Multiple Ownership Rule	)	

SINCLAIR BROADCAST GROUP, INC.'S OPPOSITION TO
FREE PRESS ET AL. PETITION FOR STAY PENDING JUDICIAL REVIEW

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May 17, 2017

TABLE OF CONTENTS

SUMMARY

To qualify for the extraordinary relief of a stay pending judicial review, Petitioners carry the burden of satisfying four factors: they must demonstrate that (1) they are likely to prevail on the merits; (2) they will suffer irreparable harm absent a stay; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors grant of the stay. Here, the Petition fails to satisfy any of these criteria. Accordingly the Commission should deny Petitioners' request for stay.

First, Petitioners are unlikely to succeed on the merits of their appeal. Courts will defer to an agency's interpretation of its governing statute where the interpretation is not arbitrary, capricious, or manifestly contrary to the statute, and courts may not set aside agency action that is rational, based on consideration of the relevant factors and within the scope of the agency's statutorily delegated authority. The Commission's determination that the UHF Discount is inextricably intertwined with the national audience reach cap is rational and fully consistent with the governing statute. The Commission was therefore reasonable to determine that failure to consider whether a *de facto* tightening of the national audience reach cap was in the public interest prior to eliminating the UHF Discount constituted material error or omission. And, given this material error or omission, the Commission's decision to reinstate the UHF Discount pending a more comprehensive rulemaking later this year was eminently rational. This logical chain of events is fully and cogently explained in the Order on Reconsideration.

The Commission can—and should—deny the Petition for Stay on this basis alone. But the Petition also fails to demonstrate any concrete, non-speculative harm that Petitioners would suffer absent a stay, and wholly ignores the very real, and adverse, impact a stay would have on not only the pending transactions referred to in the Petition, but on a number of station groups that currently would be considered over the cap if a stay was issued. Each of the Petition's arguments in this regard rely on flawed attempts to frame the Commission's reinstatement of the UHF Discount as adoption of a game-changing new rule and the false claim that a stay will work no harm because it will "maintain the status quo." Considering that reinstatement of the UHF Discount marks a return to the status quo of the last 30 years (instead of the last few months), the Petition's arguments—and its misplaced reliance on an earlier Third Circuit case granting a stay to maintain the status quo—fall flat.

Further, the Petition ultimately fails to demonstrate any public interest benefit that would accompany a stay. The Petition simply asserts that the Commission's mission is to promote competition and diversity, and fails to explain how the Order on Reconsideration undermines that objective.

Accordingly, the Petition for Stay should be denied.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule	)))	MB Docket No. 13-236

To: The Commission

SINCLAIR BROADCAST GROUP, INC.'S OPPOSITION TO FREE PRESS ET AL. PETITION FOR STAY PENDING JUDICIAL REVIEW

Pursuant to Section 1.45(d) of the Commission's Rules, 47 C.F.R. § 1.45(d), Sinclair Broadcast Group, Inc. ("Sinclair") respectfully submits this Opposition to Free Press et al.'s Petition for Stay Pending Judicial Review.[1] The Petition requests that the Commission stay the effective date of reinstatement of the UHF Discount,[2] which was reinstated in the Order on Reconsideration in the above-captioned proceeding.[3]

The Petition must be denied. It fails to meet any of the criteria required for a stay and largely rehashes the same arguments the Commission has already rejected in the Order on Reconsideration. Petitioners also mischaracterize their request for relief as a return to the status quo, while the reality is that the Order on Reconsideration itself is a return to the status quo

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[1] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Petition for Stay Pending Judicial Review (the "Petition"), MB. Docket No. 13-236, filed by Free Press, Office of Communication, Inc. of the United Church of Christ, Prometheus Radio Project, Media Mobilization Project, Media Alliance, National Hispanic Media Coalition, and Common Cause ("Petitioners") (May 10, 2017).

[2] 47 C.F.R. § 73.3555(e)(2)(i) ("For purposes of making this [national audience reach] calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market") ("UHF Discount").

[3] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Order on Reconsideration, MB Docket No. 13-236 (rel. Apr. 21, 2017) ("Order on Reconsideration").

existing prior to the Discount Elimination Order.[4] Not only do Petitioners fail to show how they would prevail on the merits—given that the Commission was reasonable to conclude that eliminating the UHF Discount without undertaking a holistic review of the national audience reach cap constituted material error or omission—but, importantly, they fail to identify any tangible harm, irreparable or otherwise, they or anyone else would suffer absent a stay. The Petition also ignores the significant, demonstrable, and concrete harms Sinclair and others would suffer if the stay were issued. Given these failings, the Petition similarly fails to demonstrate how the public interest would be served by a stay. Accordingly, Sinclair opposes the Petition and urges the Commission to deny the request for stay.

ARGUMENT

The Commission has made clear that, "[t]o qualify for the extraordinary remedy of a stay, a petitioner must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay."[5] Here, Petitioners have entirely failed to meet the test for this "extraordinary equitable relief,"[6] and the Petition should, therefore, be denied.

The Petition's attempt to rely on the Third Circuit's grant of a stay in *Prometheus Radio Project v. F.C.C.* does nothing to help the Petitioners' cause here.[7] That case is wholly inapposite to the facts and circumstances of this proceeding: First, in that case the Commission

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[4] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Report and Order, 31 FCC Rcd 10213 (2016) ("Discount Elimination Order").

[5] *In the Matter of Protecting & Promoting the Open Internet*, 30 FCC Rcd 4673 (2015) (denying petition for stay).

[6] *Id.*

[7] 2003 WL 22052896 (3d Cir. Sept. 3, 2003).

proposed extensive new ownership rules that the Third Circuit found "would significantly alter the agency's ownership rules." Here, in contrast, the Order on Reconsideration simply reinstates a rule that has existed for over 30 years, marking a return to the status quo. Second, the Third Circuit determined that although it was difficult to predict a likelihood of success on the merits, the potential harms to the moving parties outweighed the effect of a stay on the Commission or other interested parties. As described in detail below, not only are the Petitioners unlikely to succeed on the merits, but the clear, demonstrable, and concrete harms a stay would cause to third parties clearly outweigh any speculative harm that Petitioners allege might occur from a restoration of the status quo by reinstating the UHF Discount.

1. Petitioners Fail to Demonstrate Likelihood of Success on the Merits

Courts have made clear that they must "give[] deference to the agency's interpretation so long as that interpretation is not arbitrary, capricious, or manifestly contrary to the statute."[8] Further, under the Administrative Procedure Act's ("APA") arbitrary and capricious standard "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute."[9]

Given the well-established standards of judicial review, there is no reason for the Commission to conclude, and the Petitioners have failed to provide any specific evidence, that the Petitioners will prevail on the merits in an appeal of the Order on Reconsideration. Petitioners' primary basis for claiming a likelihood of success is that the Order on Reconsideration was arbitrary and capricious because it "'fails to advance the Commission's own purported policy goals' of limiting the audience reach of broadcast owners and promoting

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[8] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).
[9] *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

competition and diversity in ownership of broadcast media."[10] However, nowhere does the Petition set forth any support for this assertion, or the assertion that the elimination of the UHF Discount inherently promotes competition or diversity of ownership.

Instead, the Petition spends pages and pages recounting national ownership cap history, myopically focusing on the conversion to digital TV as negating any justification for the UHF Discount. However, in focusing principally on the technical reasons for the UHF Discount, the Petition cursorily acknowledges, but then conveniently ignores, the policy reasons behind it as well. Critically, the Petition ignores the Commission's well-reasoned bases for the Order on Reconsideration, and falsely claims that the Commission restored the UHF Discount "without acknowledgement or explanation."[11] In so doing, it dismissively states that "the Commission majority does not find any flaw in the findings of conclusions of the UHF Discount Repeal Order *other than that the earlier Commission had failed to review whether the current national cap ownership rule is sound and to fully consider whether the cap should be modified*."[12]

The Petition thus entirely misses the mark. As the Commission points out in the Order on Reconsideration, it was precisely the Commission's initial failure to consider the national ownership cap rule that rendered the Discount Elimination Order a textbook example of arbitrary and capricious decisionmaking demanding reconsideration.[13] Whether the technological justification for the UHF Discount exists or doesn't is wholly irrelevant at this stage of the

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[10] Petition at 4-5. We note that this purported policy goal of "limiting the audience reach of broadcast owners" is entirely made up by Petitioners and not supported by, nor in any way related to, the case they cite as support for this position.

[11] *Id.* at 10.

[12] *Id.* at 13-14 (internal quotations omitted, emphasis added).

[13] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("A decision is arbitrary and capricious if the agency 'has . . . entirely failed to consider an important aspect of the problem.'").

proceeding. The Commission has an obligation to examine all relevant aspects of an action before it and consider important arguments raised in comments before adopting or amending its rules. The Commission cannot (and the D.C. Circuit, no doubt, will not) ignore the well-established rulemaking requirements of the APA and the Commission's obligation to act in the "public convenience, interest, or necessity."[14]

While, as noted above, the Petition's reliance on a Third Circuit stay granted in 2003 has no bearing here, the Petition fails to consider a far more relevant Third Circuit decision from that time period, where the court concluded that the 39% national cap and the UHF Discount were inseparably linked for purposes of review:

> Congress instructed the Commission to "increase the national audience reach limitation for television stations to 39%." Since 1985 the Commission has defined "national audience reach" to mean "the total number of television households" reached by an entity's stations, except that "UHF stations shall be attributed with 50 percent of the television households" reached. We assume that when Congress uses an administratively defined term, it intended its words to have the defined meaning. Furthermore . . . we cannot entertain challenges to the Commission's decision to retain the 50% UHF discount. Any relief we granted on these claims would undermine Congress's specification of a precise 39% cap. [15]

Certainly relevant to Petitioner's likelihood of success on the merits is this Third Circuit language directly supporting the position the Commission took in the Order on Reconsideration. However, far more recent and equally relevant is the Third Circuit's 2016 vacatur of a different Commission rulemaking for the fundamental error of tightening the ownership limits (by attributing television joint sales agreements) without first determining whether the ownership

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[14] 47 U.S.C. § 303; *see also Discount Elimination Order*, Pai Dissent ("Moreover, even absent the specific legal requirement to review particular media ownership regulations every four years pursuant to section 202(h) of [the Act], 'courts have held that the Commission has an affirmative obligation to reexamine its rules over time.'").

[15] *Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (2004).

rules to be tightened remain in the public interest.[16] There, the court held that "unless the Commission determines that the preexisting ownership rules are sound, it cannot logically demonstrate that expansion is in the public interest."[17]

Putting two and two together, the Commission rationally interpreted the statutorily mandated cap to include the UHF Discount, and reasonably determined in the Order on Reconsideration that the Discount Elimination Order could not stand because, "[w]hen the Commission voted to get rid of the discount . . . it failed to consider whether this *de facto* tightening of the national cap was in the public interest and justified by current marketplace conditions."[18] Petitioners fail to explain how reinstatement of the UHF Discount—which was in place when Congress adopted the 39% cap—is "arbitrary, capricious, or manifestly contrary to the statute."[19] Petitioners also fail to explain how the Order on Reconsideration is irrational, not

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[16] *Prometheus Radio Project v. FCC,* 824 F.3d 33, 58 (3rd Cir. 2016); *see also Discount Elimination Order*, Dissenting Statement of Commissioner Michael O'Rielly ("Having apparently learned nothing from past efforts to prematurely change attribution rules for JSAs before the Quadrennial Review of media ownership rules was complete, the Commission is replicating the same flawed approach. This item stubbornly plows ahead in a similar cart-before-the-horse scheme to tinker with a calculation methodology without any consideration of the current validity [of] the overall rule it modifies.").

[17] *Prometheus Radio Project*, 824 F.3d at 58.

[18] Order on Reconsideration ¶ 1; *see also id.* ¶¶ 10 ("the Commission failed to provide a reasoned basis to eliminate the discount in isolation without also fully considering whether the cap should be modified."), 12 ("the Commission has always considered the discount together with the National Cap"), 13 ("eliminating the UHF discount on a piecemeal basis, without considering the national cap as a whole, was arbitrary and capricious."), 14 ("Reliance on the self-imposed narrow scope of the *UHF Discount NPRM* was not a sound basis for the Commission to conclude that it could not consider the broader public interest issues posed by retaining the national cap while eliminating the UHF discount, which had the effect of substantially tightening the national cap."), and 17 ("the Commission failed to fully consider important arguments and lacked a reasoned basis for its conclusion that action on the discount should not be combined with a broader review of the national cap.").

[19] *Chevron*, 467 U.S. at 842; *see also* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (CAA); *Amendment of Section 73.3555 [formerly Sections*

based on consideration of relevant factors, or outside the scope of the authority delegated to the Commission by statute.[20] The findings and conclusions outlined in the Order on Reconsideration are therefore entitled to judicial deference.

Petitioners attempt to bolster their position by asserting that Commissioner O'Rielly believes the Commission "lacks the statutory authority to [modify the national cap] in the first place."[21] This not only ignores the critical fact that Commissioner O'Rielly also clearly stated that he believes the Commission lacks the authority to eliminate the UHF Discount,[22] but highlights the fact that Petitioners have made all of these flawed arguments before, and the Commission has already fully considered and rejected them. The Commission explains this best in footnote 60 of the Order on Reconsideration:

> The Institute for Public Representation (IPR), Common Cause, and the United Church of Christ Office of Communication, Inc., (UCC) Prometheus Radio Project, and Media Mobilizing Project belatedly assert that the Commission lacks authority to modify the cap and that therefore it would be arbitrary and capricious for the Commission to reinstate the discount in order to consider in a future rulemaking proceeding whether the cap and discount should be modified. . . . [W]e find that these new arguments lack merit. First, the parties fail to support their assertion that the Commission lacks authority to modify the cap, ignoring the Commission's prior analysis and conclusion that it has such authority, which remains undisturbed. **Furthermore, if the Commission was wrong about its authority to modify the cap, then it follows that the Commission does not have authority to eliminate the discount, which was part of the cap, and the *UHF Discount Order* would need to be vacated for that reason.** Indeed, while the parties principally cite Commissioner O'Rielly's dissenting statement in support of their

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*73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Station*s, Report and Order, 100 FCC 2d 17, 54-56 ¶¶ 108-12 (1984).

[20] *See Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43.

[21] Petition at 14.

[22] *Discount Elimination Order*, Dissenting Statement of Commissioner O'Rielly ("I reject the assertion that the Commission has authority to modify the National Television Ownership Rule in any way, including eliminating the UHF discount, and therefore I dissent.").

argument, they fail to mention that Commissioner O'Rielly specifically said in his statement that the Commission lacked the authority to eliminate the UHF discount.[23]

In addition to the flaws aptly identified by the Commission, Petitioners' argument relies on the misguided assumption that the only possible alternate outcome of a future rulemaking proceeding would be to raise or eliminate the 39% cap.[24] This ignores myriad other possibilities that would leave the 39% cap in place—for example, a VHF discount or some other method of calculating reach that might appropriately balance elimination of the UHF Discount with other marketplace factors.

Thus, even before accounting for the deference owed to agency decisionmaking,[25] a reviewing court would be hard-pressed to find arbitrary and capricious the Commission's reconsideration of a plainly arbitrary and capricious order.[26] Petitioners are therefore unlikely to succeed on the merits in their appeal, and the Commission should deny their request for stay.

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[23] Order on Reconsideration ¶ 17 n.60 (internal citations omitted). The Commission goes on to explain, "Second, we disagree with the argument that, even if the Commission has authority to modify the cap, it would be arbitrary and capricious to reinstate the UHF discount when the Commission may decide at the conclusion of the new rulemaking proceeding not to adjust the cap. As IPR, Common Cause and UCC suggest, the full Commission may decide not to adjust the cap, but they fail to show that our rationale for considering these issues in tandem is flawed." *Id.*

[24] *See* Petition at 14 ("The UHF Reconsideration Order is therefore arbitrary and capricious because it is predicated on an action that, if it occurs, will undoubtedly be reversed.").

[25] *See, e.g.*, *Fort Mill Tel. Co. v. F.C.C.*, 719 F.2d 89, 91 (4th Cir. 1983) ("This court must give deference both to the agency's decision if supported by a rational basis in the record, *American Meat Inst. v. Dept. of Agriculture,* 646 F.2d 125, 127 (4th Cir.1981), and the agency's interpretation of its own statute and regulations. *Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). A court may not substitute its own reasoning for that of the agency. *SEC v. Chenery Corp.,* 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947).").

[26] 5 U.S.C. § 706.

2. Petitioners Fail to Identify Any Harm, Let Alone an Irreparable Harm, That They Would Suffer Absent a Stay

Petitioners argue that they will be irreparably harmed in the absence of a stay because "major station owners will immediately start buying more stations that will give them an actual audience reach well beyond 39%."[27] But they fail to demonstrate how this will cause them, or anyone for that matter, to suffer any measurable, irreparable harm. Giving the Petition even the most generous reading, any argument alluding to the harm of such actions is purely speculative, and as such should not be considered by the Commission in reviewing the request for a stay.[28]

As a preliminary matter, restoration of the UHF Discount simply marks a return to the status quo. Until the discount was eliminated last September, the Commission's rules allowed station owners to buy stations that, without the discount, would place them over the 39% audience reach cap. Notably, despite stations launching digital UHF operations nationwide over fifteen years ago,[29] the sky has not fallen. The entire basis for the Petition—that allowing digital UHF stations to benefit from the UHF Discount will bring sudden and irreparable harm—has been the status quo since the first digital UHF station commenced operations in 1996.[30] Indeed, everything a broadcaster would be able to do upon restoration of the UHF Discount, it could have done legally for many years prior to the Commission's adoption of the Discount Elimination Order.

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[27] Petition at 19.

[28] Just as the Commission "will dismiss speculative harms raised in a petition to deny," it should dismiss the speculative harms on which the Petition for Stay relies. *See Media General/Nexstar* ¶ 23

[29] See 47 C.F.R. Section 73.624(d).

[30] *See History of WRAL Digital*, http://www.wral.com/history-of-wral-digital/1069461/ (last accessed May 16, 2017) (recounting that WRAL transmitted the first digital signal on July 23, 1996).

Further, several station owners *already* exceed a 39% national audience reach—and have exceeded it for years—but for application of the UHF Discount.[31] Petitioners can point to no harm suffered as a result of these groups owning stations that (without the discount) exceed a 39% audience reach. Rarely has the Commission had such an ample opportunity to assess the impact of a proposed state of affairs as here, where that state of affairs has already existed for many years. Moreover, if there were such harms from that state of affairs, one would have thought the Petitioners would have been able to present ample evidence of them in the Petition. They do not. It therefore strains credulity to claim restoration of the UHF Discount will now suddenly cause irreparable harm.

At bottom, Petitioners' entire argument rests on pointing out a couple of pending and historical mergers and asserting, without any actual (or even anecdotal) evidence, that "consolidation will reduce competition and diminish the diversity of voices in the marketplace of ideas."[32] Not only does this ignore the many public interest benefits made possible by the UHF Discount and that often accompany broadcast transactions in general,[33] but it is far too speculative and attenuated to merit the "extraordinary relief" of a stay.

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[31] *See, e.g.*, Comments of ION Media Networks, MB Docket 13-236 (filed Dec. 16, 2013); ION's television networks, anchored by 60 local TV stations (59 of which are UHF), today reach nearly 90% of U.S. TV households."); Petition for Reconsideration of ION Media Networks and Trinity Christian Center of Santa Ana, Inc., MB Docket No. 13-236, at 5 (filed Nov. 23, 2016) ("Trinity has hundreds of full-power and low-power affiliates nationwide, and the backbone of this station network is Trinity's 31 full-power owned and operated stations, which include 29 UHF stations."); Comments of Univision Communications, Inc. in Support of Petition for Reconsideration, MB Docket No. 13-236 (Jan 23, 2017) (noting that, without the UHF Discount, Univision-owned stations reach 44.8% of U.S. TV households.).

[32] Petition at 19. Again, the failure to analyze the companies that exceed the cap now renders this argument moot and purely speculative.

[33] Univision Reply Comments at 3 (Jan. 23, 2017) ("The many benefits of Univision's existing UHF station combination for Hispanic viewers are clear. This platform of O&O stations has

Further, Petitioners' attempt to draw analogies to the Third Circuit's decision to grant a stay of the new ownership rules adopted in the Commission's 2002 Biennial Regulatory Review is misplaced. There, the court found that the "changes adopted by the FCC . . . *would significantly alter the agency's ownership rules* for multiple media properties, including national television networks, local broadcast affiliates, radio stations, and newspapers." Consequently, the Third Circuit reasoned that "[g]ranting the stay pending judicial review would maintain the *status quo* in order to permit appellate review after briefing on the merits."[34] Here, in contrast, the Order on Reconsideration does not adopt any change to the Commission's ownership rules, let alone a change that would "significantly alter" the regulatory landscape. Rather, the Order on Reconsideration marks a return to the status quo—reinstating the UHF Discount that has existed since 1985—in order to negate any potential harm that may have been caused by the recent Discount Elimination Order pending a proper rulemaking. In other words, *denial* of a stay here would preserve the status quo, consistent with the Third Circuit's holding in *Prometheus*.

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enabled the Univision Network to compete with the established English-language networks, making it one of the top five networks in the United States, regardless of language. It has enabled Univision to launch Unimás, a second, over-the-air Spanish-language network. And it has allowed Univision to introduce new Spanish language local news services."); ION Notice of Ex Parte (Jan. 11, 2017) ("ION relied on the UHF Discount to build America's last truly independent over-the-air broadcasting network . . . other companies like Trinity and Univision have followed similar paths to building competitive and independent networks."); *In the Matter of Applications for Consent to Transfer Control of License Subsidiaries of Media Gen., Inc., from Shareholders of Media Gen., Inc. to Nexstar Media Grp., Inc.* ¶ 29, 2017 WL 117616 (Jan. 11, 2017) ("*Media General/Nexstar*") ("We concur with the Applicants that establishing a news bureau requires significant technical infrastructure and staff and that the costs are not trivial, especially in states where Nexstar does not operate a station in the capital market. Given these significant investments, we find that establishment of state news bureaus in these states by Nexstar would be unlikely absent the transaction.").

[34] *Prometheus Radio Project v. F.C.C.*, No. 03-3388, 2003 WL 22052896, at *1 (3d Cir. Sept. 3, 2003) (emphasis added).

Even taking Petitioners' arguments at face value, Petitioners fail to explain how reinstatement of the UHF Discount as scheduled would deny them of any future remedy. Because Petitioners fail to identify and reasonably support any plausible *irreparable* harm they would suffer absent a stay, the Commission should deny their Petition.

3. A Stay Will Harm Sinclair and Other Third Parties

Petitioners do not, and cannot, offer any evidence supporting their assertion that grant of a stay will not harm parties to new transactions.[35] The fact that this section of the Petition consists of a mere four sentences, one of which is not even on point, is telling.[36] As noted earlier, Petitioners' superficial attempt to rely on the reasoning behind the Third Circuit stay is misplaced. Unlike that situation, reinstatement of the UHF Discount is the return to the status quo. And, unlike that situation, there are already pending transactions and existing broadcast groups that would be harmed by a stay.

In fact, Petitioners' baseless claim that a stay will not cause any harm, signifies a naiveté not only with respect to the business of broadcasting, but with respect to business in general. It cannot be disputed that suspending a pending transaction for months while waiting for a judicial appeal to run its course would cause significant harm. Such a delay would inherently increase financing and other costs and perhaps jeopardize funding and consummation of the transaction completely. The uncertainty caused by the delay would also harm the employees and shareholders of the companies involved, and would impact potential investments in new services.

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[35] Petition at 20.

[36] Sinclair is unclear what point Petitioners are trying to make when they assert if "the UHF Discount were reinstated after judicial review, new entrants and smaller broadcasters would be able to bid on the purchase of affected TV stations." Perhaps Petitioners believe a stay would kill any currently pending transactions, creating a chance that smaller broadcasters could pick up some stations in the aftermath. This logic is speculative at best, spiteful at worst and, if anything, supports the argument that a stay would cause harm.

Also, it is a well-established principle that uncertainty in the marketplace will negatively impact values and will cause harm not only to pending transactions, but to any potential future transactions as well.

Further, there is clear evidence that a stay will harm existing companies that currently exceed 39% audience reach if the discount is not reinstated. Because the Discount Elimination Order's grandfathering relief given to station groups that exceed the cap does not apply in the event of a transfer of such stations, granting Petitioner's request would effectively freeze these companies in regulatory limbo, and any transactions these companies might consider could result in prematurely forced divestitures to comply with the 39% cap, when the UHF Discount might ultimately be restored or the cap otherwise modified. The Commission was therefore reasonable to consider the comments these companies have submitted identifying the harms of the Discount Elimination Order.[37] The Petitioners, on the other hand, fail to address any of these tangible harms, while trying to instead rely on their purely speculative harms.

Because the harms that would accompany the stay are obvious and numerous, the Commission should deny the Petition.

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[37] *See, e.g.*, Univision Reply Comments in Support of Petition for Reconsideration (Jan. 23, 2017) ("The result of the [Discount Elimination] Order, which effectively doubled Univision's audience reach with the stroke of a pen, is that Univision can no longer acquire full power stations in new markets and, should it alter its ownership structure, may actually be forced to divest television stations, with the attendant risk of a reduction in service to an historically underserved community."); Notice of Ex Parte Communication, ION Media Networks (Jan. 11, 2017) ("the decision to eliminate the UHF Discount created an investment disincentive for companies like ION, threatened to undermine the capital structures of these companies, and weakened the very competitive networks that the Commission encouraged companies like ION to create. . . . ION relied on the UHF Discount to build America's last truly independent over-the-air broadcasting network.").

4. The Public Interest Does Not Favor Grant of the Stay

As the Petition acknowledges, likelihood of success on the merits, immediate and irreparable harm to the Petitioners, and lack of harm to third parties are the most important factors of the standard for granting a stay. Petitioners have failed to satisfy any of these factors, and their Petition should accordingly be denied.

On top of this, the Petition ultimately fails to demonstrate any public interest benefit of a stay. Instead, it offers a handful of non-sequiturs without making any logical connection to reinstatement of the UHF Discount. For example, the Petition fails to explain how denial of a stay would threaten viewers' "First Amendment right to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."[38] Petitioners also fail to explain how reinstatement of a UHF Discount that has existed since 1985 would suddenly undermine the Commission's entire regulatory framework such that its rules no longer promote competition, diversity, or "the public interest, convenience, and necessity".[39]

In contrast, the public interest is served by the Order on Reconsideration. That is, the public benefits from the Commission's ability to remedy the errors and omissions in the Discount Elimination Order through a more fulsome rulemaking proceeding that strengthens public confidence in the administrative process and ensures that the ultimate rule adopted will take into consideration all important factors.

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[38] Petition at 21.

[39] *Id.* at 22.

CONCLUSION

For the reasons detailed above, Sinclair respectfully urges the Commission to deny the Petition for Stay.

Respectfully submitted,

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May 17, 2017

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CERTIFICATE OF SERVICE

I hereby certify on this 17th day of May, 2017, that the foregoing Opposition was served via electronic mail on the following persons:

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EXHIBIT 2

IN THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

Free Press, et al. *Petitioners*, v. Federal Communications Commission and the United States of America *Respondents*	))))))))	**Case No. 17-1129**

SINCLAIR BROADCAST GROUP, INC.'S MOTION FOR LEAVE TO FILE OPPOSITION TO EMERGENCY MOTION FOR STAY

Movant-Intervenor Sinclair Broadcast Group, Inc. respectfully submits this motion for leave to file the attached Opposition to Free Press et al.'s Emergency Motion for Stay Pending Review in the above-captioned proceeding. Sinclair filed a Motion for Leave to Intervene in this proceeding on May 26, 2017. As of the date of this filing, the Court has not acted upon the motion. Respondents consent to the filing of this motion. Petitioners do not consent, but were unable to state whether they will file an opposition.

The Court directed Respondents to file a response to Petitioners' pending motion by 10:00 a.m. on June 1, 2017. This motion and the attached Opposition have been filed in accordance with that deadline, and the Opposition falls within the 5,200 word limit set forth in Federal Rule of Appellate Procedure 27(d)(2).

Sinclair has actively participated in the agency proceeding underlying the Federal Communications Commission order that is the subject of the Court's review. Sinclair will be specifically and directly impacted by this Court's ruling on the Motion for Stay. Consequently, it has a strong interest in the appropriate disposition of the Motion for Stay and has particularized knowledge about the factors at issue in this case that can assist the Court in determining whether a stay is necessary or appropriate.

Sinclair therefore asks this Court to grant this motion, accept the attached Opposition for filing, and grant all such other relief as may be just and proper.

Respectfully submitted,

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June 1, 2017

ATTACHMENT A

IN THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

Free Press, et al. *Petitioners*, v. Federal Communications Commission and the United States of America *Respondents*	))))))))	**Case No. 17-1129**

SINCLAIR BROADCAST GROUP, INC.'S OPPOSITION TO EMERGENCY MOTION FOR STAY

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June 1, 2017

TABLE OF CONTENTS

IN THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA

Free Press, et al. *Petitioners*, v. Federal Communications Commission and the United States of America *Respondents*	))))))))	**Case No. 17-1129**

SINCLAIR BROADCAST GROUP, INC.'S OPPOSITION TO EMERGENCY MOTION FOR STAY

Pursuant to Federal Rule of Appellate Procedure 27(a)(3)(A), Intervenor Sinclair Broadcast Group, Inc. opposes Free Press et al.'s ("Petitioners") Emergency Motion for Stay Pending Judicial Review (the "Motion").

This Court should deny the Motion in full because it does not meet any of the criteria required for a stay. Petitioners are unlikely to prevail on the merits because the Commission rationally interpreted its rules and governing statute to determine that (a) the regulation that attributes UHF stations with 50% percent of a market's audience for purposes of calculating compliance with the national audience reach cap (the "UHF Discount") is inextricably intertwined with the national audience reach cap, and (b) its failure to consider whether a *de facto* tightening of the national audience reach cap was in the public interest prior to eliminating the UHF Discount constituted material error or omission warranting reconsideration. *See Amendment of Section 73.3555(e) of the Commission's Rules,* *National Television Multiple Ownership Rule*, 31 FCC Rcd 10213 (2016) ("*Discount Elimination Order*").

In an attempt to side-step the Commission's reasoned decisionmaking, the Motion works from the flawed premise that the UHF Discount is "concededly obsolete," primarily relying on an inaccurate technical argument that VHF is no longer superior to UHF. But the *Reconsideration Order* does not concede this, and neither does Sinclair. Rather, the Commission explained that because the scope of its original inquiry was too narrow, its decision to eliminate the UHF Discount was unsupported by substantial evidence. The *Reconsideration Order* abrogated the Commission's earlier conclusions, and properly reserved any technical or policy analysis of the UHF Discount for a future rulemaking where it will be able to consider all relevant factors.

The Motion also fails to identify any actual harm, irreparable or otherwise, that Petitioners would suffer absent a stay. It is therefore doubtful that Petitioners even have standing to challenge the *Reconsideration Order*, or that they have exhausted their administrative remedies such that the agency action is ripe for review. Moreover, the Motion fails to address the significant and concrete harms a stay would cause Sinclair and other third parties, and ultimately fails to demonstrate how the public interest would be served by a stay.

Additionally, Petitioners incorrectly frame the Motion as a request to maintain the *status quo*. But the reality is that the *Reconsideration Order* itself is a return to the *status quo* existing for decades prior to the Commission's arbitrary and capricious decision to eliminate the UHF Discount late last year. Accordingly, Sinclair urges this Court to deny the Motion in full.

STANDARD OF REVIEW

To warrant the extraordinary remedy of a stay, the moving party must show: (1) it is likely to prevail on the merits of its appeal; (2) it will be irreparably injured absent a stay; (3) issuance of a stay would not harm other interested parties; and (4) a stay would benefit the public interest. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) ("*WMATC*"); *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Here, Petitioners have entirely failed to satisfy the "stringent standards required for a stay." *Melcher v. F.C.C.*, No. 93-1110, 1997 WL 529059, at *1 (D.C. Cir. July 30, 1997) (citing *WMATC* at 843).

ARGUMENT

1. Petitioners Are Not Likely to Succeed on the Merits

This Court has long recognized that absent "a substantial indication of probable success, there [is] no justification for the court's intrusion into the ordinary processes of administration and judicial review." *Virginia Petroleum*

Jobbers Ass'n, 259 F.2d. at 925. And, it is well-settled that a reviewing court must "give[] deference to the agency's interpretation so long as that interpretation is not arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Further, under the Administrative Procedure Act's ("APA") arbitrary and capricious standard "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); 5 U.S.C. § 706(2)(A). "Under this deferential standard of review [the Court] must affirm the Commission's decision if it examined the relevant information and gave a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *PLMRS Narrowband Corp. v. F.C.C.*, 182 F.3d 995, 999 (D.C. Cir. 1999).

Petitioners fail to explain how reinstatement of the UHF Discount—which was in place when Congress directed the Commission to set the national audience reach cap at 39%—is "arbitrary, capricious, or manifestly contrary to the statute." Instead, Petitioners cling to the false argument that there is no longer a technical need for the discount, and therefore there was nothing to review on reconsideration.

In any event, to have standing to appeal the *Reconsideration Order*, Petitioners must have suffered an (1) "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) that is "fairly traceable" to the challenged act, and (3) "likely" to be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (applying standard to request for injunctive relief); *Common Cause v. Fed. Election Comm'n*, 108 F.3d 413, 417 (D.C. Cir. 1997). Because Petitioners have not alleged any such harm, it is doubtful Petitioners have Article III standing to challenge the *Reconsideration Order*—another reason they are unlikely to prevail on the merits of their appeal.[1]

Accordingly, the Motion should be denied.

a) The UHF Discount is not "concededly obsolete."

Petitioners' basis for contending the *Reconsideration Order* is arbitrary and capricious revolves around the erroneous assertion that the Commission reinstated a rule that is "concededly obsolete and does not serve the public interest." Motion at 12. This is not true, and the *Reconsideration Order* does not purport to reinstate an obsolete rule. Rather, it properly sets aside the Commission's earlier

[1] Sinclair expects to present a more detailed standing analysis in a Motion to Dismiss to be filed later in this proceeding.

assumptions about the validity of the UHF Discount, which were "unsupported by substantial evidence." 5 U.S.C. § 706.

Indeed, the *Reconsideration Order* explains that elimination of the UHF Discount "was unwise from a public policy perspective" and that the Commission's failure to consider whether its elimination "was in the public interest and justified by current marketplace conditions" was a "mistake [that] renders [the Commission's] past action arbitrary and capricious." *Reconsideration Order* ¶ 1. In focusing principally on one misapplied technical basis for the UHF Discount, the Motion ignores the technical and operational realities of the two standards and the Commission's policy reasons for the discount.[2] Petitioners offer no evidence to suggest that these realities or policy reasons have been eliminated by the transition to digital TV such that the Commission would be wrong to consider them before modifying the UHF Discount.

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[2] In reality, the UHF discount is not an inherently technical rule, but rather a policy decision to attribute half of the population of a market to each UHF station while attributing 100% of the market population to each VHF station. The audience reach attributed to a VHF station does not generally reflect the actual percentage of the population the VHF station covers. The Commission's rule attributes to a VHF station 100% of the population in a station's "Designated Market Area" (as determined by a TV ratings agency), whether a station covers the entire market or only a fraction of it. *See* 47 C.F.R. §73.3555(e)(2)(i). And the choice of how to calculate coverage for purposes of the national ownership cap is not binary—to have a 50% UHF "discount" or no UHF "discount" at all.

Moreover, the *Discount Elimination Order* erred by accepting, without substantial evidence or sufficient explanation, that the transition to digital TV eliminated the technical disparity between UHF and VHF signals. But as the Commission has acknowledged, "VHF channels are likely always to remain somewhat superior to UHF for television broadcasting due to fundamental laws of physics over which we have no control." *Improvements to UHF Television Reception*, 90 FCC2d 1121, 1124 (1982); *Amendment of Section 73.3555 of the Commission's Rules*, 100 FCC2d 74, 93 (1985) (citing Comparability for UHF Television: Final Report, September 1980 at 2) ("Due to the physical nature of the UHF and VHF bands, delivery of television signals is inherently more difficult at UHF.").

The transition to digital did not change the laws of physics. UHF signals and VHF signals continue to have the same propagation characteristics as they did before: UHF stations in general still have smaller service areas than VHF stations; unlike VHF signals, UHF signals are line of sight and stop at the horizon; and UHF stations need far more power to reach the same distance. So even when it is theoretically possible for a UHF station to match a VHF station's service area, doing so can be prohibited by costs or the operating parameters of its license.

Although the *Discount Elimination Order* noted limitations VHF stations may face following the digital transition, it never explained how the transition eliminated the "inherent physical limitations" of UHF. *Discount Elimination Order* ¶ 14. Instead, it skirted the required analysis by citing comments that claimed, without support, that "the disparity that UHF stations once faced has been eliminated." *See id.* ¶ 26 (citing Comments of Free Press, MB Docket No. 13-236 (Dec. 16, 2013) at 6. The *Discount Elimination Order* also "note[d] that as early as 1992, the Commission anticipated the possibility that the transition to digital television would obviate the need for the UHF discount." *Discount Elimination Order* ¶ 8 n.24, citing *Review of the Commission's Regulations Governing Television Broadcasting*, 7 FCC Rcd 4111, 4115 n.37 (1992). But the footnote cited only tentatively concluded that "As the broadcast industry makes a transition to ATV [advanced TV] technology . . . such distinctions ultimately may disappear (e.g., in the event that all ATV stations are eventually moved to one band or another)." Knowing now that the digital transition did not move all UHF and VHF stations to the same band, such earlier predictions do not constitute "substantial evidence."

Regardless of whether the historical technical justification for the UHF Discount survived the digital transition, the Commission is obligated to "consider all relevant comments and material of record before taking final action in a rulemaking proceeding." 47 C.F.R. § 1.425. The *Discount Elimination Order* failed to do this, justifying reconsideration.

b) Failure to consider the UHF Discount in tandem with the national audience reach cap was material error or omission warranting reconsideration.

The Communications Act authorizes the Commission "in its discretion, to grant [a petition for] reconsideration if sufficient reason therefor be made to appear." 47 U.S.C. § 405(a). Reconsideration is warranted where the original order contains a material error or omission. 47 C.F.R. § 1.429(l)(1). An order granting reconsideration need only provide a concise statement of the Commission's reasons for the action taken. 47 C.F.R. § 1.429(i).

Petitioners fail to demonstrate that the *Reconsideration Order* was an abuse of the Commission's discretion, or that the Commission failed to state its reasons for granting reconsideration. Instead, the Motion incorrectly asserts that the *Reconsideration Order* "did not identify any legal or factual errors in the [*Discount Elimination Order*]." Motion at 10.

In reality, the Commission did identify a significant "legal error" in the *Discount Elimination Order*: failure to consider the UHF Discount in the context of the national audience reach cap rendered the *Discount Elimination Order* arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 ("A decision is arbitrary and capricious if the agency 'has . . . entirely failed to consider an important aspect of the problem.'"). As the Commission explained:

> The UHF discount allows commercial broadcast television station owners to discount the audience reach of UHF stations when calculating their

> compliance with the national television ownership rule. It is thus inextricably linked to the national ownership cap. When the Commission voted to get rid of the discount, however, it failed to consider whether this *de facto* tightening of the national cap was in the public interest and justified by current marketplace conditions. This mistake renders our past action arbitrary and capricious.

Reconsideration Order ¶ 1; *see also id.* ¶¶ 12 ("the Commission has always considered the discount together with the National Cap"), 13 ("eliminating the UHF discount on a piecemeal basis, without considering the national cap as a whole, was arbitrary and capricious."), 14 ("Reliance on the self-imposed narrow scope of the *UHF Discount NPRM* was not a sound basis for the Commission to conclude that it could not consider the broader public interest issues posed by retaining the national cap while eliminating the UHF discount, which had the effect of substantially tightening the national cap."), and 17 ("the Commission failed to fully consider important arguments and lacked a reasoned basis for its conclusion that action on the discount should not be combined with a broader review of the national cap.").

This determination is consistent with the Third Circuit's findings in *Prometheus Radio Project v. FCC*, 373 F.3d 372, 396 (2004). There, the court concluded that the 39% cap and the UHF Discount were inseparably linked for purposes of review:

> Congress instructed the Commission to "increase the national audience reach limitation for television stations to 39%." Since 1985 the Commission has defined "national audience reach" to mean "the

> total number of television households" reached by an entity's stations, except that "UHF stations shall be attributed with 50 percent of the television households" reached. We assume that when Congress uses an administratively defined term, it intended its words to have the defined meaning. Furthermore . . . we cannot entertain challenges to the Commission's decision to retain the 50% UHF discount. Any relief we granted on these claims would undermine Congress's specification of a precise 39% cap.

Id.

More recently, the Third Circuit vacated a Commission rulemaking for adopting an amendment that effectively tightened local ownership limits before completing a public interest review of the local ownership rules as a whole. *See Prometheus Radio Project v. FCC*, 824 F.3d 33, 58 (3rd Cir. 2016). The court held that "unless the Commission determines that the preexisting ownership rules are sound, it cannot logically demonstrate that expansion is in the public interest." *Id.*

Considering this precedent, the Commission rationally interpreted the 39% cap to include the UHF Discount. As such, it was reasonable to conclude that the *Discount Elimination Order* could not stand because, "[w]hen the Commission voted to get rid of the discount . . . it failed to consider whether this *de facto* tightening of the national cap was in the public interest and justified by current marketplace conditions." *Reconsideration Order* ¶ 1.

c) Reinstatement of the UHF Discount pending a more comprehensive rulemaking is not arbitrary and capricious.

Petitioners contend that the Commission's decision to reinstate the UHF Discount pending a future rulemaking is arbitrary and capricious because the Commission does not have authority to modify the 39% cap. But this wrongly assumes the rulemaking would be limited to the choice between raising or eliminating the 39% cap. Motion at 14-15. It ignores myriad options available to the Commission that would leave the 39% cap in place. After all, accepting Petitioners' argument that the Commission has authority to eliminate the UHF Discount, it follows that the Commission has authority to otherwise modify how it calculates audience reach.

In a future rulemaking the Commission could consider, among other things, (1) whether a station's reach for purposes of the national ownership cap should be limited to the portion of the population that a station actually covers rather than imputing coverage that does not actually exist; (2) whether all stations, UHF and VHF, should be attributed less than 100% coverage of their DMAs, because in many or most cases stations do not cover their entire markets; (3) whether certain technical advantages of VHF, such as signal propagation, costs to obtain similar coverage, and other coverage characteristics, exist to retain the UHF Discount; (4) whether marketplace considerations or other policy reasons warrant retention of the UHF Discount; or (5) whether there is some other method of calculating audience reach that might appropriately balance elimination of the UHF Discount with other technological and public interest factors.

Petitioners also contend that reinstatement of the UHF Discount pending a "broader reassessment of the national audience reach cap," is arbitrary and capricious because "today's Commission majority cannot predict how a future FCC might proceed." *Id.* But there is no requirement that the Commission know the outcome before launching a rulemaking. Indeed, as Petitioners acknowledge, "the APA contemplates that the Commission approach each case with an open mind." *Id.* at 15. That "there is currently no factual record on whether national limits serve the public interest," *id.*, is all the more reason that the Commission should solicit comments on the subject before modifying its rules.

2. Petitioners Fail to Identify Any Concrete Harm, Let Alone Irreparable Harm, That They Would Suffer Absent a Stay

To warrant a stay, Petitioners must demonstrate that the harms they would suffer are "'certain,' rather than speculative," and that "the 'alleged harm[s] will directly result from the action[s] which the movant[s] seeks to enjoin.'" C*oal. for Responsible Regulation, Inc. v. E.P.A.*, No. 09-1322, 2010 WL 5509187, at *1 (D.C. Cir. Dec. 10, 2010) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C.Cir .1985) (per curiam)). Under even the most generous reading of the Motion, Petitioners fail to identify any non-speculative harm that would result in the absence of a stay.

Instead, Petitioners merely observe that reinstatement of the UHF Discount could enable broadcast transactions that might be prohibited without the UHF Discount. *See* Motion at 17. Specifically, Petitioners (1) note that Sinclair filed applications to acquire Bonten Media stations that collectively account for about 1% of U.S. TV households, and (2) speculate that Sinclair's planned acquisition of Tribune Media Company "is the beginning of what is likely to be a wave of consolidation." *Id.* at 18. But the Motion fails to explain how these pending and planned transactions, or any other yet-to-be announced transaction, will cause Petitioners to any suffer imminent, concrete, and irreparable harm.

Notably, until elimination of the UHF Discount went into effect on November 23, 2016, the Commission's rules allowed station owners to buy stations that, without the discount, would place them over the 39% audience reach cap. In other words, everything Sinclair or any other broadcaster would be able to do upon restoration of the UHF Discount, it could have done legally for many years prior to the Commission's repeal of the UHF Discount late last year. Thus, the entire basis for the Motion—that allowing broadcasters to benefit from the UHF Discount will bring sudden and irreparable harm—has been the *status quo* since the UHF Discount was adopted in 1985, or since the first digital UHF station commenced operations in 1996, or—taking an even more conservative approach—since 2004 when the cap (with the discount) was raised to 39%.

And indeed, several broadcasters *already* exceed a 39% national audience reach—and have exceeded it for years—but for application of the UHF Discount. Petitioners can point to no harm suffered as a result of these groups owning stations that (without the discount) reach 64.8% (ION), 44.1% (Univision) and 43.7% (Tribune) of U.S. TV households. *See FCC Takes Lid of National Station Ownership*, Motion at Attachment F. And comments to the underlying proceeding show just the opposite.[3] It therefore strains credulity to claim restoration of the UHF Discount will now suddenly cause Petitioners to suffer immediate and irreparable harm.

Petitioners' attempt to draw analogies to the Third Circuit's stay of new ownership rules adopted in the Commission's 2002 Biennial Regulatory Review is, therefore, misplaced. Motion at 11. There, the court found that the "changes adopted by the FCC . . . *would significantly alter the agency's ownership rules*[.]" *Prometheus*, 2003 WL 22052896 *1 (3rd Cir. 2003) (emphasis added).

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[3] *See, e.g.*, Univision Reply Comments, MB Docket 13-236, at 3 (Jan. 23, 2017) ("The many benefits of Univision's existing UHF station combination for Hispanic viewers are clear. . . . [it] has enabled the Univision Network to compete with the established English-language networks, making it one of the top five networks in the United States, regardless of language. It has enabled Univision to launch Unimás, a second, over-the-air Spanish-language network. And it has allowed Univision to introduce new Spanish language local news services."); ION Notice of Ex Parte, MB Docket 13-236 (Jan. 11, 2017) ("ION relied on the UHF Discount to build America's last truly independent over-the-air broadcasting network . . . other companies like Trinity and Univision have followed similar paths to building competitive and independent networks.").

Consequently, the Third Circuit reasoned that "[g]ranting the stay pending judicial review would maintain the *status quo* in order to permit appellate review after briefing on the merits." *Id.* Here, in contrast, the *Reconsideration Order* does not adopt any change to the Commission's ownership rules, let alone a change that would "significantly alter" the regulatory landscape. Rather, consistent with the Third Circuit's reasoning in *Prometheus*, the *Reconsideration Order* marks a return to the *status quo*—reinstating the UHF Discount that has existed since 1985—in order to negate any potential harm of the recent *Discount Elimination Order* pending a proper rulemaking.

At bottom, Petitioners' argument rests on pointing to the *possibility* of future mergers and asserting—without any evidence—that they will suffer harm because "consolidation will reduce competition and diminish the diversity of voices in the marketplace of ideas." Motion at 19. But this alleged harm is purely speculative, and would result from *any* broadcast transaction between two current broadcasters—regardless of their size or whether the 39% cap or UHF Discount were implicated—and therefore does not "directly result" from the *Reconsideration Order*.

Additionally, Petitioners do not deny (nor can they) that the Commission could approve pending applications subject to the final resolution of UHF Discount, and could require station divestitures to comply with the ultimate rule.

Rather, Petitioners claim that "the Commission has repeatedly failed to enforce previously-mandated divestures." But the "harm" in this context stems from possible future Commission action, not the *Reconsideration Order*. And the cases Petitioners cite to support their claim are inapposite, as they relate to a long-standing Commission policy (not at issue here) of granting waivers of ownership rules where a station or newspaper could not viably sustain stand-alone operations.

For example, in *Counterpoint Communications Inc*., the Commission granted a temporary waiver to permit common ownership of stations WTXX and WTIC-TV and a newspaper in the Hartford, Connecticut market where "WTXX is at a real risk of failure if it operates alone." 20 FCC Rcd 8582, 8589 (2005). In *Fox Television Stations, Inc.*, the Commission denied a request for a permanent waiver of its newspaper-broadcast cross-ownership rule and gave the licensee 90 days after the effective date of an order that "either adopts a new [newspaper-broadcast cross-ownership] rule or upholds [the] existing rule to (1) comply with the rule in effect at that time or (2) file a new request for a waiver of such rule." 29 FCC Rcd 9564, 9578-79 (2014). These cases highlight the Commission's other ownership rules that remain operative regardless of the UHF Discount, and demonstrate the Commission's flexibility to conduct transaction-by-transaction reviews as the public interest requires.

Because Petitioners fail to identify and reasonably support any imminent, concrete, and irreparable harm they would suffer absent a stay, the Court should deny the Motion. As noted above, this failure to allege an injury-in-fact also calls into question whether Petitioners have standing to challenge the *Reconsideration Order* at all.

Similarly, Petitioners' failure to exhaust administrative remedies is another reason they are not likely to succeed on the merits of their appeal, another reason why there is no imminent irreparable harm (or any other concrete harm), and another reason why there is no "emergency" justifying their request for expedited consideration of a Motion filed the Friday before Memorial Day weekend. Petitioners imply that grant of Sinclair's pending applications will cause them immediate harm in the absence of a stay. But that transaction will not be ripe for grant on the June 5 reinstatement date (because the 30-day petition to deny period will not have expired), and Petitioners have not yet challenged it at the agency level. Petitioners' failure to exhaust their administrative remedies is therefore the cause of any alleged emergency harm, not the *Reconsideration Order*.

3. A Stay Will Harm Sinclair and Other Interested Parties

"Relief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents." *Virginia Petroleum Jobbers Ass'n*, 259 F.2d at 925. Petitioners do not, and cannot, offer any evidence supporting their assertion that grant of a stay will not harm broadcasters. Motion at 20. As noted earlier, Petitioners' attempt to rely on the reasoning behind the Third Circuit's grant of a stay in *Prometheus* is misplaced. *Id.* at 20-21. Unlike that situation, reinstatement of the UHF Discount is the return to the *status quo*. And, unlike that situation, there are already pending transactions and existing broadcast groups that would be harmed by a stay.

Petitioners' baseless claim that a stay will not cause any harm signifies a naiveté not only with respect to the business of broadcasting, but with respect to business in general. It cannot be disputed that suspending a pending transaction for months while waiting for a judicial appeal to run its course would cause significant harm. Such a delay would inherently increase financing and other costs and perhaps jeopardize funding and consummation of the transaction completely.

The uncertainty caused by the delay would also harm the employees and shareholders of the companies involved, and would impact potential investments in new services. But the Motion entirely fails to expand its harm analysis beyond broadcasters to these other third parties, or to viewers who benefit from the increased resources and other synergies that generally accompany broadcast transactions. *See, e.g., Applications for Consent to Transfer Control of License Subsidiaries of Media Gen., Inc., from Shareholders of Media Gen., Inc. to Nexstar Media Grp., Inc.*, 2017 WL 117616 ¶ 29 (Jan. 11, 2017) (concluding that merger would enable increased local news operations, given that "establishing a news bureau requires significant technical infrastructure and staff and that the costs are not trivial.").

Petitioners' speculation that small broadcasters might benefit from the renewed availability of stations that larger broadcasters would have otherwise acquired absent a stay does not negate the harm to those broadcasters with pending transactions. *See* Motion at 20. Further, Petitioners assume, without any evidence, that those small broadcasters are willing and able to acquire these stations, and that all small broadcasters are *per se* good for the public while all large broadcasters are inherently harmful.

Further, a stay will harm existing companies that currently would exceed the 39% audience reach cap but for the UHF discount. Because the *Discount Elimination Order's* grandfathering relief given to station groups that exceed the cap does not apply in the event of a transfer of such stations, granting Petitioners' request would effectively freeze these companies in regulatory limbo, and any transactions these companies might consider could result in prematurely forced divestitures to comply with the 39% cap, when the UHF Discount might ultimately be restored or the cap otherwise modified.[4]

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[4] *See, e.g.*, Univision Reply Comments in Support of Petition for Reconsideration, MB Docket 13-236 (Jan. 23, 2017) ("The result of the [Discount Elimination]

Because the harms that would accompany a stay are obvious and numerous, the Court should deny the Motion.

4. The Public Interest Does Not Favor Grant of the Stay

As the Petitioners acknowledge, "the *Virginia Petroleum* test places the greatest weight on the likelihood of success on the merits and the possibility of immediate and irreparable harm to the moving parties." Motion at 21. Petitioners have failed to satisfy either factor, and their Motion should accordingly be denied.

On top of this, the Motion does not identify any public interest benefit of a stay. It asserts that "a stay would prevent immediate consolidation in ownership" but ignores the reality that, even without the UHF Discount, many broadcasters have headroom under the 39% cap to acquire additional stations. *Id.*

The remainder of the Motion's public interest analysis consists of non-sequiturs with no connection to the UHF Discount. For example, the Motion does not explain how denial of a stay would threaten viewers' "First Amendment right

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Order, which effectively doubled Univision's audience reach with the stroke of a pen, is that Univision can no longer acquire full power stations in new markets and, should it alter its ownership structure, may actually be forced to divest television stations, with the attendant risk of a reduction in service to an historically underserved community."); Notice of Ex Parte Communication, ION Media Networks (Jan. 11, 2017) ("the decision to eliminate the UHF Discount created an investment disincentive for companies like ION, threatened to undermine the capital structures of these companies, and weakened the very competitive networks that the Commission encouraged companies like ION to create. . . . ION relied on the UHF Discount to build America's last truly independent over-the-air broadcasting network.").

to receive suitable access to social, political, esthetic, moral, and other ideas and experiences. . . .” *Id.* Nor does it explain how reinstatement of a rule that has existed since 1985 would suddenly undermine the Commission’s entire regulatory framework such that its rules no longer promote competition, diversity, or “the public interest, convenience, and necessity.” *Id.* at 22.

In contrast, the public interest is served by the Commission’s adherence to the strictures of the APA and its decision to remedy the material errors of the *Discount Elimination Order*. A more fulsome rulemaking proceeding will strengthen public confidence in the administrative process and ensures that the ultimate rule adopted takes into consideration all important factors.

CONCLUSION

For the reasons detailed above, Sinclair respectfully urges the Commission to deny the Motion for Stay.

Respectfully submitted,

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June 1, 2017

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,075 words, as determined by the word count function of Microsoft Word, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman and 14 point font.

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I hereby certify that, on June 1, 2017, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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EXHIBIT 3

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREE PRESS, *et al.*,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 17-1129
	)	
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,	)	
	)	
Respondents.	)	
	)	

OPPOSITION OF MOVANT-INTERVENORS TRIBUNE MEDIA COMPANY, TWENTY-FIRST CENTURY FOX, INC., UNIVISION COMMUNICATIONS INC., ION MEDIA NETWORKS, INC., AND TRINITY CHRISTIAN CENTER OF SANTA ANA, INC., TO PETITIONERS' EMERGENCY MOTION FOR STAY

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June 1, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

GLOSSARY

DMA	–	Nielsen Designated Market Area
FCC	–	Federal Communications Commission
UHF	–	Ultra High Frequency
VHF	–	Very High Frequency

Movant-Intervenors Tribune Media Company ("Tribune"), Twenty-First Century Fox, Inc. ("Fox"), Univision Communications Inc. ("Univision"), ION Media Networks, Inc. ("ION"), and Trinity Christian Center of Santa Ana, Inc. ("Trinity"), respectfully oppose the Emergency Motion for Stay Pending Judicial Review filed by Petitioners Free Press et al. Petitioners have not satisfied the stringent requirements for a stay pending judicial review.

BACKGROUND

Since 1985, an FCC regulation has imposed a "national ownership cap" that limits the number of television stations that may be owned by a single station group based on the aggregate "national audience reach" of the group's stations. *See* 47 C.F.R. § 73.3555(e)(1); *Amendment of Section 73.3555 [Formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, FCC 84-638, 100 F.C.C. 2d 74, 100 (1985) ("*1985 Order*"). The level of the national ownership cap was adjusted from time to time until, in 2004, Congress directed the FCC to amend its regulations to set the cap at 39 percent of "national audience reach." *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100.

Congress used the term "national audience reach" in implementing the 39 percent cap. The term, which is defined in the FCC rule promulgated in 1985, was unchanged for 32 years, and always distinguished between stations operating on Very High Frequency ("VHF") spectrum and those operating on Ultra High Frequency ("UHF") spectrum. Specifically, the FCC defined the "reach" of a VHF station as *all* of the households in the VHF station's Nielsen Designated Market Area ("DMA"), whereas the FCC has defined the "reach" of a UHF station as *half* of the households in the UHF station's DMA. 47 C.F.R. § 73.3555(e)(2)(i); *see 1985 Order*, 100 F.C.C. 2d at 100. This distinction is known as the "UHF discount."[1]

In 2013, the FCC issued a notice of proposed rulemaking seeking comment on whether to change the national audience reach definition by eliminating the UHF discount on the basis of the improved technical performance of UHF channels following the transition to digital broadcasting. *See* Notice of Proposed Rulemaking, *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, FCC 13-123, 28 F.C.C. Rcd. 14,324 (2013) ("*NPRM*"). Then-Commissioner (now Chairman) Pai dissented, noting that although the *NPRM* effectively "proposes to tighten the national cap, it does not

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[1] The UHF discount was adopted to account for the fact that "the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength," which affected "its ability physically to reach viewers." *1985 Order*, 100 F.C.C. 2d at 93.

seek comment on whether doing so would be a good idea," and "therefore misses the forest (the overall national cap) for the trees." *Id.* at 14,344.

Several broadcasters likewise commented that lowering the national ownership cap by eliminating the UHF discount—thereby doubling the audience reach attributable to many stations—would require the FCC to analyze whether such a reduction is in the public interest. *See, e.g.*, Comments of 21st Century Fox, Inc. and Fox Television Holdings, Inc., MB Docket No. 13-236, at 13, 17-19 (FCC Dec. 16, 2013). They submitted evidence that, in the face of the rapid proliferation of national video programming networks, horizontal and vertical consolidation of the national cable distribution marketplace, and the emergence of online video distributors with ubiquitous national reach, tightening a national ownership cap that applies only to broadcasters would harm the public interest by limiting broadcasters' ability to remain viable in a diverse and competitive media marketplace. *See, e.g.*, *id.* at 19-21; Comments of Sinclair Broadcast Group, Inc., MB Docket No. 13-236, at 9-10 (FCC Dec. 16, 2013).

On September 6, 2016, the FCC released an order that redefined "national audience reach" by eliminating the UHF discount while leaving the 39 percent national audience reach limitation in place. *See* Report and Order, *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, MB Docket No. 13-236, FCC 16-116 (rel. Sept. 6, 2016) ("*UHF*

Discount Elimination Order"). The *UHF Discount Elimination Order* did not consider whether reducing the national ownership cap by eliminating the UHF discount was in the public interest. Rather, the FCC concluded that it would, for the first time, delink the national cap from the UHF discount. Further, the FCC decided to forgo a public interest analysis on the ground that it could not assess the overall national ownership cap without "[i]nitiating a new rulemaking proceeding to undertake a complex review of the public interest basis for the national cap." *Id.* ¶ 40. The effect of the *UHF Discount Elimination Order* was to tighten significantly the national limit on station ownership, and as a result (among others) four station groups that had relied on the UHF discount to assemble their station portfolios suddenly were deemed to exceed the 39 percent cap. *See id.* ¶ 45.

Movant-Intervenors ION and Trinity petitioned the FCC to reconsider its decision on the ground that the FCC had failed to offer any analysis of the impact of its order on the national ownership cap and the public interest. *See* Petition for Reconsideration of ION Media Networks, Inc., and Trinity Christian Center of Santa Ana, Inc., MB Docket No. 13-236, at 4 (FCC Nov. 23, 2016). Movant-Intervenor Fox petitioned this Court for judicial review of the *UHF Discount Elimination Order*. That case is being held in abeyance pending the outcome of the petition for reconsideration. *See* Status Report, *Twenty-First Century Fox, Inc. v. FCC*, No. 16-1375 (D.C. Cir. Apr. 20, 2017).

On April 20, 2017, the FCC granted reconsideration of the *UHF Discount Elimination Order*. The agency concluded that its original decision was arbitrary, capricious, and unwise as a matter of policy because it "never explained why tightening the cap was in the public interest or justified by current marketplace conditions." Order on Reconsideration, *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule,* MB Docket No. 13-236, FCC 17-40 ¶ 13 (Apr. 20, 2017) ("*Reconsideration Order*"). The FCC held that its earlier "fail[ure] to fully consider important arguments and [its] lack[] of a reasoned basis for its conclusion that action on the discount should not be combined with a broader review of the national cap" were sufficient grounds under 47 C.F.R. § 1.429 for the agency to grant reconsideration. *Id.* ¶ 17. The FCC stated that it would consider the UHF discount "as part of a broader reassessment of the national audience reach cap" that the agency "will begin later this year." *Id.* ¶ 15.

On May 10, 2017, Petitioners requested that the FCC stay the *Reconsideration Order* pending judicial review. *See* Petition for Stay Pending Judicial Review, MB Docket No. 13-236 (FCC May 10, 2017).

On May 12, 2017, Petitioners filed a petition for review in this Court, and on May 26, 2017, Petitioners filed the pending Emergency Motion for Stay.

ARGUMENT

The Court will grant the "extraordinary relief" of a stay only if a petitioner establishes that: (1) it is likely to succeed on the merits on review; (2) it would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest. *See Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). Petitioners are unable to satisfy these demanding requirements.

I. PETITIONERS ARE UNLIKELY TO SUCCEED ON THE MERITS.

In the *UHF Discount Elimination Order*, the FCC decided to eliminate the UHF discount based solely on a conclusion that the technological justification for the discount no longer exists. The FCC expressly declined to "reexamine the national audience reach cap in conjunction with our examination of the UHF discount," based on the majority's view such a reexamination would cause "delay" and "unnecessarily complicate" the proceedings. *Id.* ¶ 40. The FCC did not "foreclose the possibility of examining the national audience reach cap" at a later date, but deemed it "appropriate" to eliminate the UHF discount without undertaking a comprehensive examination of whether this action is in the public interest. *Id.* In the *Reconsideration Order*, the FCC determined that its decision to eliminate the UHF discount based on a narrow analysis of a single technological factor was arbitrary and capricious, as well as unwise, and that the long-established

UHF discount should remain in effect while the FCC considers whether its elimination would serve the public interest. The FCC's decision to undertake this broader public interest inquiry is reasonable and unlikely to be reversed by this Court. *See U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 663 (D.C. Cir. 2016) (arbitrary and capricious standard "is highly deferential" and "presumes the validity of agency action") (internal quotation marks and citation omitted).

1. There can be no serious dispute that the UHF discount is inextricably linked to the national ownership cap. The sole purpose of the UHF discount is to determine how national audience reach should be calculated for purposes of the ownership cap. *See* 47 C.F.R. § 73.3555(e); *1985 Order*, 100 F.C.C. 2d at 92-93. When Congress set the national television ownership cap at 39 percent, it used the FCC-defined term "national audience reach." Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100. Because the UHF discount is integral to determining "national audience reach" under the FCC rule adopted in 1985, Congress undoubtedly understood that audience reach would be calculated by applying the UHF discount when it set the cap at 39 percent. *See Prometheus Radio Project v. FCC*, 373 F.3d 372, 395-97 (3d Cir. 2004). Prior to the *UHF Discount Elimination Order*, moreover, the FCC consistently considered the UHF discount and the national cap in tandem. *See Reconsideration Order* ¶ 12. Indeed, given the integral relationship between the UHF discount and the national cap, the

Third Circuit has held that the UHF discount, like the national cap, is not subject to the statutory quadrennial review requirement applicable to the FCC's other media ownership rules. *See Prometheus Radio Project*, 373 F.3d at 395-97.

2. The FCC has identified a reasonable basis for concluding that elimination of the discount is not in the public interest. *See Reconsideration Order* ¶ 15 (noting that there are now "greatly increased options for consumers in the selection and viewing of video programming"). Since the national cap was last reevaluated in 2004, the media marketplace has undergone seismic changes. Viewership of national network programming has declined as "over-the-top" distributors such as Netflix, Hulu and Sony Vue have proliferated. In addition, there has been an explosion of online video consumption by users of YouTube and Facebook, which provide local news, sports and entertainment programming that competes with broadcasters. Meanwhile, the cable sector has experienced both horizontal and vertical consolidation. Yet broadcasters remain subject to ownership rules that limit their ability to compete on an equal footing with their largely unregulated counterparts. The cap, even with the UHF discount in place, limits broadcasters' ability to achieve the scope and scale they need to launch new national distribution platforms and to continue investing in high-quality programming to serve their local communities—programming their unregulated competitors are under no obligation to provide. Eliminating the UHF discount thus restricts the ability of

broadcasters to compete with non-broadcast video programmers, many of which enjoy full national distribution.[2]

Petitioners do not argue that these public interest considerations are irrelevant, or that the only issue the FCC is permitted to consider is whether the original technical justification for the UHF discount remains valid. Petitioners are right not to contest this issue, because Congress did not specify the reasons that would justify a decision by the FCC to retain or discard the discount. Moreover, the FCC generally is required to act in the public interest. *See, e.g.*, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 111-12, § 202(h); *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) (FCC's "rulemaking power is expressly confined to promulgation of regulations that serve the public interest") (citing 47 U.S.C. § 303(r)).

Instead, Petitioners make a wholly unconvincing one-paragraph argument that tightening the national ownership cap serves the public interest (Stay Mot. 13-14). The FCC itself has made no such determination, and Petitioners acknowledge

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[2] *See, e.g.*, Comments of ION Media Networks, Inc., MB Docket No. 13-236, at 6-9, 15 (FCC Dec. 16, 2013); Letter from Christopher G. Wood, Univision Communications Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-236 (July 6, 2016); Letter from Colby M. May, counsel for Trinity Broadcasting Network, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-236 (July 29, 2016); Comments of Univision Communications Inc., MB Docket No. 13-236, at 4 (FCC Dec. 16, 2013).

that "there is currently no factual record on whether national limits serve the public interest." Stay Mot. 15. Moreover, the FCC has identified arguments that could well lead it to conclude that eliminating the UHF discount harms the public interest.[3]

3. Contrary to Petitioners' assertion (Stay Mot. 14-15), the FCC's decision to undertake a broader reexamination of the public interest before eliminating the UHF discount does not rest on speculation about the outcome of that reexamination. The FCC determined that its original decision was arbitrary and capricious, as well as unwise, because the agency changed the definition of "national audience reach" without examining the ramifications of that change or whether the change serves the public interest. *See Reconsideration Order* ¶ 14.

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[3] Moreover, many digital stations that operated in the UHF band in the analog era remain handicapped vis-à-vis their former VHF competitors even after the digital transition. The FCC's digital transition rules provided for the replication of analog stations' existing coverage areas by their new digital facilities, thereby perpetuating the UHF disadvantage. *See* Sixth Report and Order, *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, FCC 97-115, MM Docket No. 87-268, ¶ 29 (1997). The FCC has acknowledged the disparate effects of this approach. *See* Notice of Proposed Rule Making, *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket 03-15, FCC 03-8, ¶ 31 (2003) (explaining that, while "most analog VHF stations were allocated UHF digital facilities with power levels generally sufficient to permit replication of the station's analog VHF coverage," analog UHF stations were "allocated significantly less power," sufficient only to "permit replication of the analog coverage area of the UHF facilities, which is significantly smaller in most cases than the analog coverage area of VHF facilities").

That is hardly an irrational (let alone an "utterly irrational," Stay Mot. 15) conclusion. The FCC also looked to an earlier case in which the FCC determined that a television station selling more than 15 percent of another local station's advertising time would be deemed to have an ownership interest in the second station for purposes of the FCC's local television ownership rule. This technical change had the effect of tightening the ownership rule, but the FCC did not evaluate whether the underlying rule itself remained appropriate. The Third Circuit held that the FCC had erred, explaining that "unless the Commission determines that the preexisting ownership rules are sound, it cannot logically demonstrate that expansion is in the public interest." *Prometheus Radio Project v. FCC*, 824 F.3d 33, 58 (3d Cir. 2016). The Third Circuit's conclusion supports the FCC's decision to grant reconsideration here. At a minimum, the FCC gave a reasoned explanation for its decision, which is all that is required. *See AT&T Corp. v. FCC*, 113 F.3d 225, 229 (D.C. Cir. 1997) ("[T]he FCC was free to modify its rule on a petition for reconsideration so long as the modification was a 'logical outgrowth' of the earlier version of the rule, and provided the agency gave a reasoned explanation for its decision that is supported by the record.") (citations omitted).

Petitioners appear to argue that, when an agency concludes that it has erred by failing to consider one or more important factors, the agency cannot reconsider its own decision unless it can predict that consideration of the additional factors will lead to a different outcome. That makes no sense. The FCC has broad authority to grant a petition for reconsideration that is filed within thirty days of public notice of the order. *See* 47 U.S.C. § 405(a). Moreover, as petitioners note (Stay Mot. 15), agencies are not supposed to prejudge the outcome of administrative proceedings. Thus, if Petitioners were correct, agencies would be largely powerless to correct their own mistakes. Instead, when an agency failed to consider an important aspect of the problem, the case would have to proceed to court. If the court concluded that the agency had erred, it would remand to the agency for further consideration without inquiring into whether consideration of the additional factors will lead to a different result. *See, e.g.*, *AT&T Corp. v. FCC*, 86 F.3d 242, 243 (D.C. Cir. 1996) ("Because the Commission failed to consider AT&T's argument . . . we vacate the Commission's Order and remand for reconsideration."). There is no sound reason why an agency should be prevented from taking this step on its own when it reasonably believes it has failed to consider an important aspect of the problem before it.

4. Even if Petitioners could somehow overcome these obstacles, they are unlikely to prevail on two additional questions that are vital to their success on the merits.

First, Petitioners contend (Stay Mot. 16-17) that the FCC has no authority to modify the 39 percent national ownership cap. Petitioners must show that they are likely to prevail on this issue, because if the FCC has authority to modify the 39 percent cap as well as the UHF discount, it clearly is reasonable for the agency to consider these inextricably intertwined issues together. *See ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002) ("Clearly, . . . the Commission is entitled to substantial deference 'when it acts to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated,' including the objective of implementing large-scale revisions 'in a manner that would cause the least upheaval in the industry.'") (citations omitted). But Petitioners were late to raise this argument before the FCC. *See Reconsideration Order* ¶ 17 n.60; *see also Sioux Valley Rural Television, Inc. v. FCC*, 349 F.3d 667, 678 (D.C. Cir. 2003). Moreover, the FCC has explained why it has authority to reconsider the national cap. *See UHF Discount Elimination Order* ¶¶ 17-24. And even if Petitioners could prevail on this issue, they are unlikely to prevail on the merits of this case. As explained above, the FCC may decide that the public interest is served by leaving the UHF discount in place without modifying the 39 percent cap.

Second, Petitioners must establish that, if the FCC has no authority to modify the 39 percent cap, it *does* have authority to modify the UHF discount. The FCC itself has concluded that "if the Commission was wrong about its authority to modify the cap, then it follows that the Commission does not have authority to eliminate the discount, which was part of the cap." *Reconsideration Order* ¶ 17 n.60; *see also UHF Discount Elimination Order* at 39 (dissenting statement of Commissioner O'Rielly).

In sum, neither the FCC nor any court has ever subscribed to the series of propositions that Petitioners must establish to prevail in this case. It was reasonable for the FCC to conclude that the long-established UHF discount should remain in effect until the agency determines whether eliminating it is in the public interest. Accordingly, Petitioners are unlikely to succeed on the merits.

II. PETITIONERS HAVE NOT SHOWN THAT THEY WILL BE IRREPARABLY INJURED ABSENT A STAY.

To qualify for a stay, petitioners must show that they will suffer harm that is "certain and great, actual and not theoretical, beyond remediation, and of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (internal quotation marks and emphasis omitted). Petitioners fall well short of this demanding showing.

Although the *Reconsideration Order* restores the *status quo ante* by retaining a rule that has been in effect for 32 years, Petitioners nevertheless assert that it is "a major policy change." Stay Mot. 15, 19. Petitioners have it backwards. It is the *elimination* of the long-established UHF discount that represents a "major policy change." Indeed, Petitioners acknowledged before the FCC that the stated purpose of the *Reconsideration Order* was to "maintain the *status quo ante* pending the initiation of a future notice and comment proceeding." Petition for Stay Pending Judicial Review, MB Docket No. 13-236, at 2 (FCC May 10, 2017). In contrast to the UHF discount's long history, the *UHF Discount Elimination Order* was effective for only a few months, during which time the FCC did not consider a single television station transaction that would implicate the national ownership cap. The Court should not enter a stay that erects a barrier to television station ownership combinations that have been permissible under the FCC's rules for decades.[4]

Petitioners assert that a stay is necessary to prevent "numerous otherwise prohibited transactions." Stay Mot. 17. For the most part, Petitioners rely on media and analyst reports that such transactions "could" occur, "may" occur, or are "expected" to occur. Stay Mot. Attachment F at 2-4. Such vague speculation is insufficient to show irreparable harm to anyone, let alone to Petitioners. The fact

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[4] *See, e.g.*, *Dayton Bd. of Educ. v. Brinkman*, 439 U.S. 1358, 1358 (1978) (denying an application for stay because "the *status quo* . . . here [] can be preserved only by denying" the stay); *Golden Gate Restaurant Ass'n v. City & Cty. of San Francisco*, No. C 06-06997, 2007 WL 4591729, at *2 (N.D. Cal. Dec. 28, 2007); *United States v. Michigan*, 505 F. Supp. 467, 471-72 (W.D. Mich. 1980) ("Here, unlike the typical situation in which a stay might be appropriate, the State urges this court change radically the *status quo* . . . .").

that the UHF discount has been in effect for decades, including for nearly eight years since the completion of the digital transition, casts grave doubt on petitioners' assertion that, absent a stay, the *Reconsideration Order* will immediately result in a tidal wave of new transactions.[5] It is also far from obvious that permitting transactions that would exceed an un-discounted 39 percent cap creates any harm at all. Today, four major broadcast groups, all of which serve important and diverse communities, operate on this basis without any public harm.

Apart from speculative news reports, Petitioners cite only two potential transactions. *See* Stay Mot. 17-18. For several reasons, Petitioners' assertions concerning these proposed transactions are not sufficient to demonstrate that they will suffer irreparable harm absent a stay.

First, Petitioners have not demonstrated that they, or their members, would be harmed by Sinclair's acquisition of Bonten's or Tribune's stations, or even that they view any of those stations. Absent such evidence, Petitioners not only cannot

[5] Petitioners incorrectly argue that this case is similar to a case in which the Third Circuit stayed an FCC order altering certain media ownership rules pending judicial review. *See Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896 (3d Cir. Sept. 3, 2003) (per curiam). The situation in that case was significantly different because (among other reasons) the new ownership rules had not been in effect for decades, and therefore the court was persuaded that staying their effectiveness would maintain the status quo. *See id.* at *1. Here, in contrast, the FCC's *Reconsideration Order* leaves in place a rule that has been in effect for 32 years.

demonstrate irreparable harm but cannot show the "personal stake in the outcome of the controversy" needed to "warrant [their] invocation of federal-court jurisdiction." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (emphasis omitted). Petitioners' inability to demonstrate concrete and imminent harm (as discussed below) raises a serious question about whether Petitioners have established Article III standing.[6]

Second, any harm to Petitioners is not "certain." Parties seeking to acquire television stations must apply for the FCC's consent, which initiates an administrative process that includes public notice and the opportunity to file oppositions (and, as appropriate, to seek judicial review). *See* 47 U.S.C. §§ 310(d), 309(b); Wood Decl. at 1-2. As Petitioners acknowledge, the FCC cannot grant such an application unless it determines that approval is in the public interest. *See* 47 U.S.C. § 310(d); Wood Decl. at 2. At least one Petitioner previously has successfully availed itself of this procedure to raise objections with respect to a

[6] This Court has had occasion to question certain Petitioners' standing. *See* *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) (per curiam); *Nat'l Hispanic Media Coalition v. FCC*, No. 96-1236, 1997 WL 811776, at *1 (D.C. Cir. Nov. 12, 1997) (per curiam unpublished order).

specific proposed transaction that did "not violate any Commission rule or policy" (Stay Mot. 19) and was subsequently withdrawn.[7] *See* Exhibit A.

Third, Petitioners have not shown that any harm to them is imminent. Petitioners' own declaration states that applications seeking to take advantage of the *Reconsideration Order* would not be granted for approximately two months if unopposed, and three months or longer if opposed. *See* Wood Decl. at 4. In fact, approval may take much longer. *E.g.*, *Applications for Consent to Transfer of Control of License Subsidiaries of Media Gen., Inc. from Shareholders of Media Gen., Inc. to Nexstar Media Grp., Inc.*, MB Docket No. 16-57, DA 17-23, 2017 WL 117616 (FCC Jan. 11, 2017) (approving transaction more than 11 months after filing); *Applications for Consent to Transfer of Control from License Subsidiaries of Allbritton Commc'ns Co. to Sinclair Television Grp., Inc.*, 29 FCC Rcd. 9156 (2014) (same).

Fourth, Petitioners have not shown that any harm to them is irreparable. They assert that if a transaction is approved, the FCC will not require divestiture even if the UHF discount is later eliminated. But there is no dispute that the FCC

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[7] In that case, Free Press prevailed in challenging a transaction that was permitted under FCC rules on the ground that it nonetheless was contrary to the public interest. As that example demonstrates, although *unopposed* applications may typically be granted by FCC staff (*see* Stay Mot. 18-19), the FCC treats *opposed* applications quite differently.

has authority to order such a divestiture, and has exercised that authority in the past. *See, e.g.*, *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978); *Fox Television Stations Inc. v. FCC*, 280 F.3d 1027, 1053 (D.C. Cir. 2002).

For all of these reasons, Petitioners have not come close to showing that they will suffer irreparable harm in the absence of a stay.

III. A STAY WILL HARM OTHER PARTIES AND IS NOT IN THE PUBLIC INTEREST.

In a single short paragraph, Petitioners assert that a stay will not harm broadcasters because it will simply "maintain the status quo" and allow broadcasters to "continue to operate their businesses as before pending judicial review." Stay Mot. 20. As explained above, however, a stay would actually alter a status quo that has been in effect for 32 years. A stay thus would harm broadcasters that have operated in good faith reliance on the integrated 39 percent cap, including the long-standing definition of "national audience reach."

A stay would effectively halve the cap for some station groups. As a result, station group owners that historically have been in compliance with the 39 percent cap suddenly would be deemed to exceed it. ION has reported that elimination of the UHF discount will have an immediate adverse effect on its market value and ability to raise capital.[8] And ION, Univision, and Trinity have stated that repeal of the UHF discount will lead to diminished business opportunities and a reduction in service to their viewers.[9]

A stay would require these owners to break up their station groups upon a "change in control," an event that includes certain recapitalization or refinancing transactions. *See Reconsideration Order* ¶ 52; *see, e.g., K. Rupert Murdoch (Transferor) and Fox Entertainment Group (Transferee)*, 24 FCC Rcd. 5824, 5824-25 (FCC 2009). Thus, a stay would restrict some group owners' ability to engage in refinancings and recapitalizations. If forced divestitures occurred as a result of a stay, they could have a wide range of adverse consequences including disruption of distribution networks that serve viewers and advertisers and loss of broadcast television service to historically underserved communities.

Petitioners assert (Stay Mot. 21-22) that a stay would advance the public interest by promoting competition, localism, and diversity. But the Commission has made no such determination. In the *UHF Elimination Order*, it simply concluded that the technological basis for the UHF discount no longer applied and

[8] *See* Letter from Robert M. McDowell, counsel for ION Media Networks, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 13-236, at 2 (Jan. 11, 2017).

[9] *See* Opposition to Petition for State of ION Media Networks, Inc., Trinity Christian Center of Santa Ana, Inc., and Univision Communications Inc., MB Docket No. 13-236, at 13-14 (FCC May 17, 2017).

declined even to consider whether eliminating the UHF discount was in the public interest. In the *Reconsideration Order*, moreover, the FCC identified reasonable arguments, supported by the record, that eliminating the UHF discount would harm the public interest by making it more difficult for broadcasters to compete with non-broadcast platforms that provide video programming and to form new networks. *See Reconsideration Order* ¶ 15. Petitioners appear to argue that a stay serves the public interest simply because it would impose additional restrictions on ownership of television stations. If that were a valid argument, *any* restriction on media ownership would be in the public interest. Neither Congress nor the FCC has adopted that extreme view.

The public interest is also served by minimizing unnecessary regulatory instability. The UHF discount has been in effect for 32 years. The FCC has acted in the public interest by avoiding an abrupt regulatory shift that may be quickly reversed.

CONCLUSION

The Emergency Motion for Stay should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,028 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman and 14 point font.

/s/ Dustin Cho
Dustin Cho

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Application for Assignment of License of WMYS-LP from Weigel Broadcasting Co. to WSBT, Inc.	)))	BALTTL-20080818ABS
Application for Assignment of License of WCWW-LP from WCCW-TV Limited Partnership to WSBT, Inc.	)))	BALTTL-20080818ABQ
Application for Assignment of License of WBND-LP from WBND-TV Limited Partnership to WSBT, Inc.	)))	BALTTL-20080818ABN

PETITION TO DENY

Free Press respectfully submits this Petition to Deny the assignment of the licenses of WMYS-LP, WCWW-LP and WBND-LP, South Bend, IN to WSBT, Inc., an entity wholly owned and controlled by Schurz Communications, Inc. ("Schurz").

Free Press is a national, nonpartisan organization working to promote diverse and independent media ownership, strong public media, and universal access to communications. Free Press has nearly 500,000 members and activists throughout the country, including the South Bend, IN area. The Declarations of C. Lincoln Johnson, Joshua Leuthold and John Sitter, members of Free Press, provided as Attachment A hereto, are submitted in support of this petition.

WSBT, Inc. is the licensee of WSBT-TV, the CBS affiliate in South Bend. Thus, if the proposed transaction were approved, Schurz would own four of the six TV network affiliates in South Bend. In addition to WSBT-TV, Schurz owns the *South Bend Tribune*, the only daily newspaper in South Bend, and WSBT-AM and WNSN(FM), both located in South Bend. There is probably no market in the country in which one entity currently has that much control over the advertising market and over the marketplace of ideas. The fact that Schurz is well-established in South Bend, and that it may even claim that it has a record of superior service with its existing properties is irrelevant to whether it, or any applicant, should be afforded so much power in any community.

Unlike full-power TV stations, as to which the Commission has adopted specific ownership rules, the Commission makes case-by-case determinations with respect to whether grant of low power TV applications is in the public interest. *Low Power Television Service*, 51 RR2d 476, ¶94 (1981) (declining "to impose inviolable rules"). This does not change the basic requirements of Section 309(a) of the Communications Act; the burden is always on any applicant to make an affirmative demonstration that grant is in the public interest.

The record here raises very substantial questions of fact which cannot be answered without an evidentiary hearing. *Citizens TV Protest Committee v. FCC*, 348 F.2d 56, 60 (D.C. Cir. 1965); *Clarksburg Publishing Company v. FCC*, 225 F.2d 511, 520-21 (D.C. Cir. 1955). *See also Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392 (D.C. Cir. 1985). Approval would clearly be contrary to the public interest. Accordingly, the Commission should designate the three applications for hearing.

The Commission has long recognized that maintaining diversity in the local marketplace of ideas is central to the Communications Act. *See, e.g, Frontier Broadcasting Co.*, 27 FCC 486 (1971). "In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC v. NCCB*, 436 U.S. 775, 780 (1978); *see also United States v. Midwest Video Corp.*, 406 U.S. 649, 665-670 (1972); *Metropolitan Television Co. v. FCC*, 289 F.2d 874 (D.C. Cir. 1961); *Carter Mountain Transmission Corp. v. FCC,* 321 F.2d 359 (D.C. Cir. 1963); *Carroll Broadcasting Co. v.*

FCC, 258 F.2d 440 (D.C. Cir. 1958).

The citizens of South Bend have a huge stake in the outcome of this proceeding. Their right to a vibrant marketplace of ideas is guaranteed by the First Amendment, which "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1944) Moreover, "[t]he 'public interest' standard necessarily invites reference to First Amendment principles." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1972). In addition, even though the Commission does not enforce the antitrust laws, it may call on antitrust policies to promote diversity in giving content to the "public interest, convenience and necessity." *United States v. Radio Corporation of America,* 358 U.S. 334, 351 (1958).

As is more fully set forth in the Report of S. Derek Turner, Attachment B hereto, if the proposed transaction is approved, Schurz would own the number 1, number 3, number 5 and number 7 ranked TV stations, the only daily newspaper and the number 2 and number 4 radio stations, including the only news formatted radio station, in South Bend. He shows that the TV market (HHI approximately equal to 3000), the radio market (taking LMA's into account) (approximately equal to 2700), and the DMA-wide print market (approximately equal to 3300) in South Bend are all "highly concentrated markets." Not surprisingly, the market for news producing outlets (print, radio and TV) is already stratospheric. If the Schurz transaction is approved, the HHI will ascend from 6451 to 6778. Schurz alone will control 81 per cent of the revenue in the South Bend news market.

The burden faced by Schurz is substantial, indeed. It is beyond peradventure that concentration of this magnitude is contrary to the public interest, especially in light of the absence of any countervailing benefits. And, although it bears the burden of establishing that grant of the applications is in the public interest, Schurz has submitted no public interest statement or other evidentiary submission relating to this matter. It does not claim, much less establish, that any of the involved stations are failing , that they are experiencing financial distress, that it will be adding significant amounts of new local news, or that the Schurz properties will exercise independent news judgments. Thus, it meets none of the criteria which a majority of the Commission has recently said would be necessary to rebut a presumption against cross-ownership in medium-sized or smaller markets. *See 2006 Quadrennial Review*, 23 FCCRcd 2310, 2050-55 (2008), *appeal pending*.

CONCLUSION

WHEREFORE, Free Press asks that the Commission dismiss the assignment applications or designate them for hearing pursuant to 47 U.S.C. §309(d), and grant all such other relief as may be just and proper.

Respectfully submitted,

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September 22, 2008